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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1404

TENNESSEE CORPORATION,
a Delaware corporation,
Petitioner,

vs.

SEABOARD COAST LINE RAILROAD COMPANY,
a Virginia corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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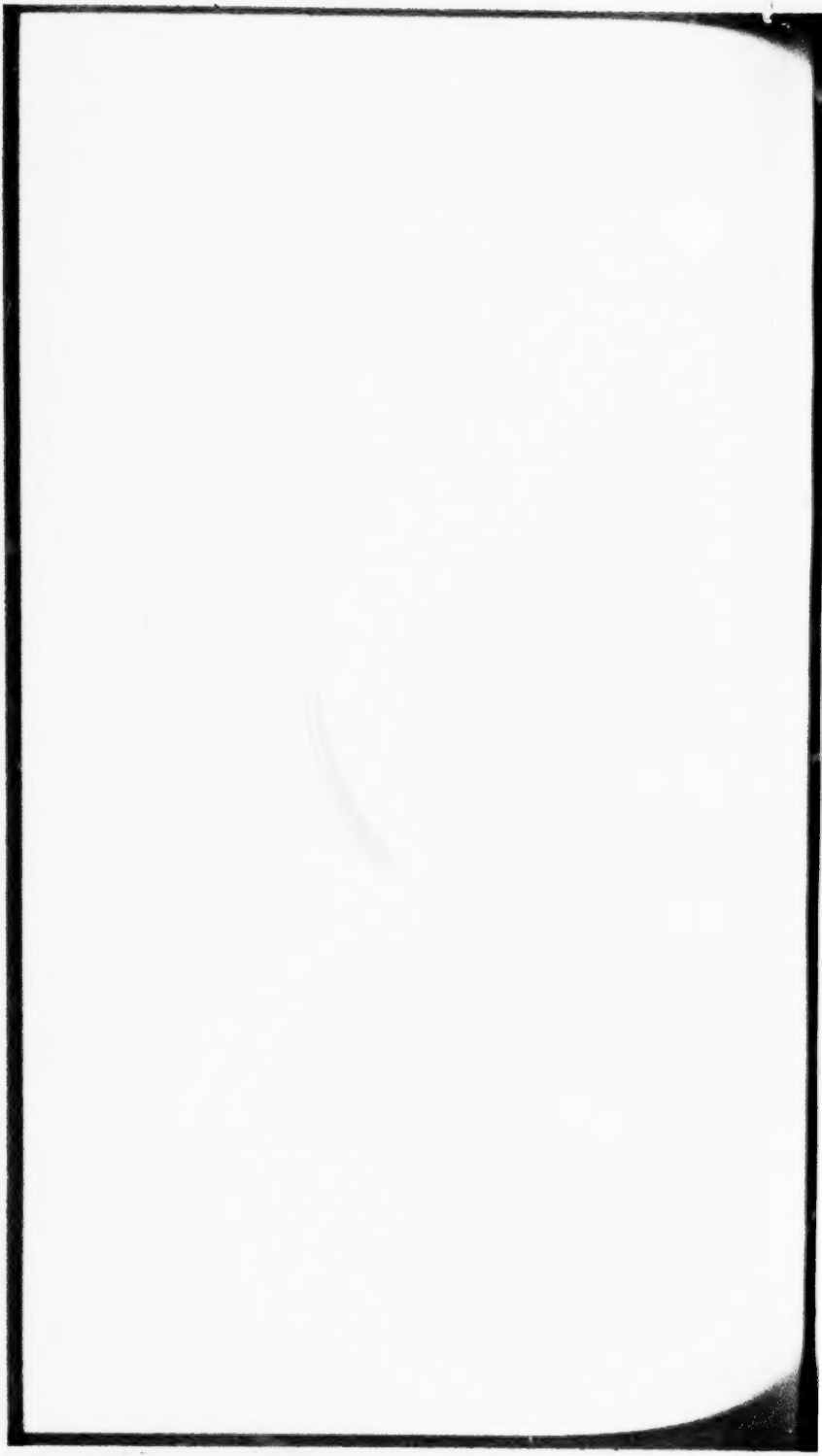

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IN THE

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TENNESSEE CORPORATION,
a Delaware corporation,

Petitioner,

vs.

SEABOARD COAST LINE RAILROAD COMPANY,
a Virginia corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-captioned case on January 27, 1970. Petition for rehearing denied on February 19, 1970.*

*"R" means certified transcript of appendix used in lower court. "A" means appendix hereto. The petitioner will be called "Industry" and respondent will be called "Railroad".

CITATION TO OPINION BELOW

The opinion below is unreported and is printed in the appendix hereto, infra, pages 13-25.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 27, 1970. (A 24) The jurisdiction of this Court is invoked under Rule 19(1)(b), Supreme Court Rules.

WHETHER —

THE COURT OF APPEALS IN HOLDING THAT THE INDEMNITY AGREEMENT REQUIRED THE INDUSTRY TO INDEMNIFY THE RAILROAD FOR THE RAILROAD'S OWN NEGLIGENCE DECIDED AN IMPORTANT QUESTION IN CONFLICT WITH THE APPLICABLE LAW OF FLORIDA.

STATEMENT

Suit was brought in the United States District Court for the Middle District of Florida by the Railroad seeking to recover in Count I from the Industry the sum of $15,511.28 representing property damage to the railroad's locomotives, cars and trackage arising out of a collision which occurred on the Industry's premises on the night of February 8, 1964, when a train owned and operated by one party collided with a train owned and operated by the other. (R 1-2)

In Count III, the Railroad sought to recover an attorney's fee and costs incurred in defending a previous suit brought against the Railroad by Herman L. Johns, an employee of the Industry, who was injured in the collision. (R 2-3)

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Counts I and III of the complaint were based on contractual indemnity whereby Count II was based on negligence. (R 1-3) The indemnity provisions in Counts I and III were contained in an agreement dated January 21, 1960, and in an easement grant of even date incorporated in said agreement. These indemnity provisions were as follows:

> "(c) The Industry will promptly, at its own cost and expense, and subject to all proper demurrage and other charges, load or unload all cars which are on said sidetrack for loading or unloading by the Industry; that, (except as provided in Article 6(g) hereof,) it will not allow cars delivered to the Industry on said sidetrack to be removed therefrom except by the Railroad; and that in the event of damage to or destruction of any such cars while on said sidetrack, whether due to improper use of the cars by the Industry, or agents or employees of the Industry, or to fire, or to any other cause traceable to said Industry, unless the same be the result of negligence of the agents or employees of the Railroad, or third person, the Industry will make good and pay to the Railroad the loss due to such damage to or destruction of such car or cars. (R 7-8)
>
> * * *
>
> "(e) Except as provided for in subparagraphs (b), (c) and (g) of paragraph 6 hereof, and as hereinafter provided in this sub-paragraph, the Railroad hereby agrees to hold the Industry harmless from any and all claims and demands of every nature on account of injury to person or persons or injury to, or loss of, property of the Industry or the property of such other persons, firms or corporations in the possession and under the control of the Railroad situated on said sidetrack where caused by the negligence of the Railroad, its agents, servants or employees, or by any other person or persons, firm or corporation, provided, however, that said

injury to persons or property, or loss of property, is not directly caused by the power of the Industry when employed by the Industry over the sidetrack, or by personnel employed by the Industry acting in the course of their employment. (R 8)

* * *

"(g) The Industry shall have the right to switch with its own power over said sidetrack and/or connecting plant tracks of the Industry, excluding the portions of said Track No. 11 north of Station 3+22 and South of Station 51+84, cars delivered to it by the Railroad under the terms hereof, provided, however, that the Industry shall be responsible for and shall indemnify the Railroad from and against any and all claims arising out of the damage to or destruction of said cars and the contents thereof caused by or resulting from the operation by the Industry of its own power, regardless of whether such cars are damaged or destroyed while on said sidetrack or whether or not said cars and contents had been delivered to the Railroad as hereinabove provided. The Industry shall assume, and it hereby assumes responsibility for and agrees to pay, and also agrees to indemnify, and hold the Railroad harmless from and against all loss, damage, cost, liability, judgments or expense (including necessary counsel fees), in connection with any loss, injury or damage of any and every character and howsoever caused, whether to employees of either party hereto or to third persons, or to the property of either party hereto, or of other persons, that may be sustained or incurred in connection with or arising out of the operation of said power of the Industry over the said sidetrack. (R 9)

* * *

"3. The party of the second part (railroad) covenants and agrees to hold the party of the first part (industry) harmless from any and all claims

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and demands of every nature on account of injury to person or persons or injury to or loss of property of the party of the first part or to the property of such other persons, firms or corporations in possession and under the control of the party of the second part hereto situated on the hereinbefore described property where caused by the negligence of the party of the second part, its agents, servants or employees or by any other person or persons, firm or corporation, provided, however, that the party of the first part covenants and agrees to hold party of the second part harmless from any and all claims or demands of every nature on account of injury to persons or damage to or loss of property which is caused by or results from operation by the industry of its power over the sidetracks located on the easement hereby granted, or by employees of the party of the first part in carrying out of the provisions of paragraph 2 hereof. (R 15-16)"

The Industry filed a motion to dismiss directed to the complaint (R 17-18), and the trial Court denied said motion. (R 19)

The Industry in its Third and Fourth Defenses asserted that the negligence of the Railroad caused the collision or contributed proximately to the cause of the collision. (R 20-21)

The Railroad moved to strike these defenses as they pertained to Counts I and III of the complaint on the grounds that the Railroad was entitled to indemnity from the Industry under the indeminity provisions notwithstanding the Railroad's own negligence. (R 25-28) The trial Court granted the Railroad's motion to strike, and the Industry's Third and Fourth Defenses were stricken as they pertained to Counts I and III. (R 29-30)

The Railroad then moved for a summary final judgment on the grounds that the trial Court had previously ruled "that the Sidetrack Agreement in question indemnified the Railroad for its own negligence when the loss or damage was sustained or incurred in connection with or arising out of the operation of the defendant's power over the sidetrack in question." (R 31-32) The trial Court granted the Railroad a partial summary judgment on liability as to Counts I and III finding that the Industry was liable to the Railroad under paragraph 6(g) of said agreement. (R 37-38)[1]

A trial on the issue of damages only was conducted on March 13, 1969, and the trial Court entered a verdict in favor of the Railroad on Count I for $15,511.28 in property damages. The trial Court also awarded the Railroad $2,000.00 on Count III for its attorney's fee, plus costs of $200.00, for services in defending the suit previously brought by Herman L. Johns against the Railroad. A final judgment was entered in the total sum of $22,314.15 in favor of the Railroad on March 24, 1969. (R 40)

The Industry appealed from this final judgment on April 9, 1969, and the Court of Appeals in effect held that the aforesaid indemnity provisions clearly and unequivocally provided indemnity to the Railroad from the Industry for the Railroad's own negligence, citing *Gulf Oil Corporation v. Atlantic Coastline R. Co.*, 196 So.2d 456 (2d Fla. App. 1967), certiorari denied in 201 So.2d 893. (A 16-17)

---

[1]At the time the trial Court entered partial summary judgment in favor of the Railroad on liability as to Counts I and III, paragraph 3 of the easement grant dated January 21, 1960, was not before the Court. Paragraph 3 is found on page 15 of the transcript of record. However, paragraph 3 was before the trial Court when it reaffirmed at pre-trial conference its previous ruling granting the Railroad a partial summary judgment on liability. (R 39)

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In its decision, the Court of Appeals found that the words "howsoever caused" set out in paragraph 6(g) of the agreement, which words were omitted from paragraph 3 of the easement grant, provided the specificity necessary to require the Industry to indemnify the Railroad for the Railroad's own negligence. (A 20)[2]

REASONS FOR GRANTING THE WRIT

1. Clearly, the question presented is of importance to the rights of contracting parties when one party is contending that an indemnity agreement provides indemnity for his own negligence. With respect to such contracts, valuable property rights are affected so that the failure of the Fifth Circuit Court of Appeals to follow the applicable law of Florida in such cases is tantamount to the denial of due process.

2. Petitioner submits that the Court of Appeals failed to follow the applicable law of Florida as enunciated in *Gulf Oil Corporation v. Atlantic Coastline R. Co.*, 196 So.2d 456 (2d Fla. App. 1967), certiorari denied in 201 So.2d 893. In the *Gulf Oil Corporation* decision the Court was also construing an indemnity agreement whereby the railroad contended that the oil company was required to indemnify the railroad for its own negligence under a license agreement. Under this license agreement, the oil company was allowed to maintain pipe lines on the railroad's premises. Two employees of the oil company were burned and received personal injuries while working on the railroad's premises, and

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[2]The pertinent indemnity provisions are found in paragraph 6 (c), (e) and (g) of the agreement and in paragraph 3 of the easement grant, both of which are dated January 21, 1960. Under paragraph 7 (e) of said agreement, paragraph 3 of the easement grant is incorporated into the agreement.

they brought suit against the railroad charging it with negligence. The employees' claims were settled with the railroad for $100,000.00, and the railroad sought indemnity from the oil company under the license agreement. The indemnity provision in the *Gulf Oil Corporation* decision read as follows:

> " 'Fourth: That Licensee (plaintiff) shall and will at all times indemnify and save harmless the Licensors, their successors and assigns, from, and will pay and discharge all loss, costs, expense and damage to persons or property resulting from or in any manner connected with the laying, maintenance, operation or presence of said pipe lines or contents thereof on the premises of the Licensors or the removal of said pipe lines therefrom.' " p. 457

In reversing the trial Court's finding that the plaintiff oil company had agreed in the above provision to indemnify the railroad for the railroad's own negligence, the appellate court in the *Gulf Oil Corporation* decision adopted what is referred to as the "majority rule," when it held:

> "It is evident, then, that Florida decisions hold that an indemnity agreement which indemnifies against the indemnitee's own negligence must state this 'in clear and unequivocal' language. It is also clear that in Nat Harrison Associates, Inc. v. Fla. Power & Light Co., 162 So.2d 298 (D.C.A. Fla. 1964) and Fla. Power & Light Co. v. Elmore, supra, the court ruled that the words 'against any liabilities whatsoever' did not constitute 'clear and unequivocal' language sufficient to indemnify the indemnitee against its own negligence. The language of the Elmore decision indicates that the court adopted the majority rule that there can be no presumption that an indemnitor meant to assume liability for an

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indemnitee's negligence unless there is explicit reference to the indemnitee's negligence in the contract. We likewise conclude that in order for an indemnity clause or contract to indemnify against an indemnitee's own negligence, the clause or contract must expressly state that such liability is undertaken by the indemnitor.

"Thus is (sic) would appear that the majority rule is the better, and that in order for one to indemnify against indemnitee's own negligence general language will not suffice. The term clear and unequivocal goes to the specific indemnification; that is, the language 'any liabilities whatsoever' as used in the Elmore case, supra, as well as 'shall and will at all times indemnify and save harmless * * * and will pay and discharge all loss,' the language used in the instant case, is not the clear and unequivocal language sought, but rather there must be language specifically designating indemnification against one's own negligence.

"The language of the indemnity clause in the instant case contains no reference to indemnifying against the negligence of the indemnitee which is necessary to exclude it from the majority rule, and thus it was error for the trial judge to enter a declaratory judgment finding the clause did indemnify defendants against their own negligence."

3. When the Fifth Circuit Court of Appeals held that the words "howsoever caused" provided the specificity necessary to allow indemnity to the Railroad for its own negligence, it did not comply with the law of Florida as enunciated in the *Gulf Oil Corporation* decision. This is true not only because the provisions of paragraphs 6(c) and (e) of the agreement clearly provide that the Railroad will indemnify the Industry if damage results from the Railroad's negligence, but be-

cause paragraph 3 of the easement dealing with indemnity omits the words "howsoever caused" found in paragraph 6(g). In view of the strict requirements of the *Gulf Oil Corporation* decision and the omission of the words "howsoever caused," the Industry submits that the agreement when read in its entirety is ambiguous and vague as to the intention of the parties. This is *extremely* important in view of the rule adopted in Florida in *Smith v. Ryan,* 142 So.2d 139 (Fla. App. 1962), where the Court adopted a rule of strict construction in construing such contracts. In *Smith v. Ryan,* the Court held:

> "It is never presumed that a contract is intended to protect one against his own negligence, and hence, unless it clearly so states, the courts hold that such was not the intention. Annotation 175 A.L.R. 8; Jackson v. Florida Weathermakers, Fla. 1951, 55 So.2d 575. * * *." p. 141

It is apparent that the lower Court misconstrued the law of Florida as enunciated in the *Gulf Oil Corporation* and *Smith v. Ryan* decisions, and that in doing so failed to follow the law of Florida involving important contractual rights between the parties.

It is submitted that if a Florida Court had the indemnity agreement in question before it for consideration, a different result would have been reached than the result reached by the Court of Appeals.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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MACFARLANE, FERGUSON,
ALLISON & KELLY
P. O. Box 1531, Tampa, Florida

Attorneys for Petitioner,
Tennessee Corporation

PROOF OF SERVICE

I, Charles W. Pittman, one of the attorneys for Tennessee Corporation, petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of April, 1970, I served a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, together with the Appendix, on the respondent by mailing a copy in a duly addressed envelope, postage prepaid, to its respective attorneys of record, as follows: Richard W. Reeves of Allen, Dell, Frank & Trinkle, Marine Bank Building, Tampa, Florida 33602.

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APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28007

SEABOARD COAST LINE RAILROAD COMPANY,

Plaintiff-Appellee, Cross-Appellant,

versus

TENNESSEE CORPORATION,

Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court for the Middle District of Florida

(January 27, 1970)

Before BROWN, Chief Judge, TUTTLE and MORGAN, Circuit Judges.

TUTTLE, Circuit Judge: This appeal presents again the question under the Florida Law: under precisely what contractural relationships may one of two contracting parties be indemnified by the other for injury or damage resulting from its own negligent acts. If this were an article other than an opinion of a court it might be entitled, "Jacksonville Terminal Company Revisited," *Jacksonville Terminal Co. v. Railway Express Agency, Inc.*, (5th Cir., 1961, 296 F. 2d 256). The revisiting is necessary because since this court decided the *Jacksonville Terminal Company* case, the courts of the State of Florida have established new principles of law in this field that, of course, in a diversity action we accept as binding.

The plaintiff railroad in counts one and two of the complaint sought to recover from the defendant Tennessee Corporation the sum of $15,511.28, representing property damage to the plaintiff's locomotives, cars and

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trackage arising out of a collision which occurred on the Tennessee Corporation's premises on the night of February 8, 1964 when a train owned and operated by the defendant "Using its [Tennessee's] own power and railroad equipment" collided with a train owned and operated by the other. In Count three the plaintiff railroad sought to recover attorney's fee and costs incurred in defending a previous suit brought against the plaintiff by one Herman L. Johns, an employee of the Tennessee Corporation, who was injured in the collision. Counts one and three of the complaint were based on contractual indemnity whereas count two was based on negligence.

Upon motion duly made, the trial court dismissed count two as being barred by the Florida Limitations of Actions Statute of three years for an action injuring personal property, in that count two was based on negligence. At the same time, the court denied the motion to dismiss the claims asserted in counts one and three in that they alleged a right to recover based on contractual indemnity.

Having stricken a defense alleging negligence of the plaintiff railroad company as a defense to the suit, thus construing the contractual indemnity agreement as covering injury caused under the circumstances of the case whether caused by the negligence of the railroad or not, the trial court entered a summary judgment on counts one and three for the railroad and, after conducting an appropriate hearing, made findings of fact and final conclusions of law with respect to the amount of damages to be awarded.

As we have indicated, the principal contention here is that Tennessee should have been permitted to prove that it was the railroad's negligence that caused the injury to the railroad's equipment, and thus Tennessee would not be liable, this contention being based upon its construction of the contractual arrangements between the parties which it contends did not satisfy the Florida

requirements of a contract by which one party intends to indemnify another against its own negligent acts. Secondarily, Tennessee complains of the failure of the trial court to dismiss the action for damages for injury to the personal property, even though arising under the indemnity contract rather than being based on common law negligence, since Tennessee contends that the three year statute would bar all actions for injury to personal property no matter how arising. Finally, Tennessee takes exception to some of the items of damages included in the final award.

Once again, we pose the principal question, and then state as best we can the present state of the Florida law. The principal question is by what formulation of language may two parties contract in a manner that will require one of them to indemnify the other against all loss or claim or injury which it may suffer, even though the loss, claim or injury is attributable to its own negligent conduct. Next, the law applicable to the solution of this problem has now been stated by the Florida Appellate Court in a manner differently than this court decided in *Jacksonville Terminal Co., supra,* in which we found that the Florida court had not adopted what was then called the "majority rule" and that under the Florida law "we do not hesitate to conclude that Railway Express Agency's promise to indemnify Jacksonville Terminal Company 'for all losses, etc.' clearly and unequivocally manifests an intention to absolve Jacksonville Terminal Company from liability for all losses, including those caused by its own negligence." *Gulf Oil Corp. v. Atlantic Coastline RR Co.,* 196 So.2d 406 (Fla. App. 1967), cert. den. 201 So. 2d 893. In that case the plaintiff, Gulf Oil Corporation, brought suit against the railroad seeking a declaratory judgment as to whether the oil company was required to indemnify the railroad under a licensing agreement for the railroad's own negligence. Under the existing agreement, the oil company was allowed to maintain pipelines on the railroad's premises. Two employees of the plaintiff oil company

were burned and received personal injuries while working on the railroad's premises, and they brought suit against the railroad charging it was negligent. The employees' claims were settled by the railroad for $100,000 and the railroad sought indemnity from the oil company under the license agreement. The indemnity provision there before the court read as follows:

> "Fourth, that licensee shall and will at all times indemnify and save harmless the licensors, their successors and assigns, from, and will pay and discharge all loss, costs, expense and damage to persons or property resulting from or in any manner connected with the laying, maintenance, operation or presence of said pipelines or contents thereof on the premises of the licensors or the removal of said lines therefrom."

The Florida Court of Appeals reversed the trial court's finding that the plaintiff oil company had agreed to indemnify the railroad for the railroad's own negligence, and said:

> "It is evident, then, that Florida decisions hold that an indemnity agreement which indemnifies against the indemnitee's own negligence must state this in 'clear and unequivocal' language. It is also clear that in Nat Harrison Associates, Inc. v. Fla. Power & Light Co., 162 So. 2d 298 (D.C.A. Fla. 1964) and Fla. Power & Light Co. v. Elmore, supra, the court ruled that the words 'against any liabilities whatsoever' did not constitute 'clear and unequivocal' language which was sufficient to indemnify the indemnitee against its own negligence. The language of the Elmore decision indicates that the court adopted the majority rule that there can be no presumption that an indemnitor meant to assume liability for an indemnitee's negligence unless there is explicit reference to the indemnitee's negligence in the contract. We likewise conclude that in order for

an idemnity clause or contract to indemnify against an indemnitee's own negligence, the clause or contract must expressly state that such liability is undertaken by the indemnitor.

"Thus is (sic) would appear that the majority rule is the better, and that in order for one to indemnify against indemnitee's own negligence general language will not suffice. The term clear and unequivocal goes to the specific indemnification; that is, the language 'any liabilities whatsoever' as used in the Elmore case, supra, as well as 'shall and will at all times indemnify and save harmless * * * and will pay and discharge all loss,' the language used in the instant case, is not the clear and unequivocal language sought, but rather there must be language specifically designating indemnification against one's own negligence.

"The language of the indemnity clause in the instant case contains no reference to indemnifying against the negligence of the indemnitee which is necessary to exclude it from the majority rule, and thus it was error for the trial judge to enter a declaratory judgment finding the clause did indemnify defendants against their own negligence."

It appearing then that the intention to indemnify one against his own agents must be specifically provided for in an indemnity contract, we now look at the terms under which the parties here before the court were operating. (Emphasis has been added wherever it appears in the following quotations.)

"(c) The Industry will promptly, at its own cost and expense, and subject to all proper demurrage and other charges, load or unload all cars which are on said sidetrack for loading or unloading by the industry; that, (except as provided in Article 6(g) hereof,) it will not allow cars delivered to the In-

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dustry on said sidetrack to be removed therefrom except by the railroad; and that in the event of damage to or destruction of any such cars while on said sidetrack, whether due to improper use of the cars by the Industry, or agents or employees of the Industry or to fire, or to any other cause traceable to said Industry, *unless the same be the result of negligence of the agents or employees of the Railroad, or third persons,* the Industry will make good and pay to the Railroad the loss due to such damage or destruction of such car or cars.

* * * *

* * * *

"(e) Except as provided for in sub-paragraphs (b) (c) and (g) of paragraph 6 hereof and as hereinafter provided in this sub-paragraph, the Railroad hereby agrees to hold the Industry harmless from any and all claims and demands of every nature on account of injury to person or persons or injury to, or loss of, property of the Industry or the property of such other persons, firms or corporations in the possession and under the control of the Railroad situated on said sidetrack *where caused by the negligence of the Railroad,* its agents, servants or employees, or by any other person or persons, firm or corporation, *provided, however,* that said injury to persons or property, or loss of property, *is not directly caused by the power of the Industry when employed by the industry over the sidetrack,* or by personnel employed by the Industry acting in the course of their employment.

* * * *

"(g) The Industry shall have the right to switch *with its own power* over said sidetrack and/or connecting plant tracks of the Industry, excluding the portions of said Track No. 11 north of Station 322 and South of Station 5184, cars delivered to it by the

Railroad under the terms hereof, provided, however, that the Industry shall be responsible for and shall indemnify the Railroad from and against any and all claims arising out of the damage to or destruction of said cars and the contents thereof *caused by or resulting from the operation by the Industry of its own power,* regardless of whether such cars are damaged or destroyed while on said sidetrack or whether or not said cars and contents had been delivered to the Railroad as herein provided. The Industry shall assume, and it hereby assumes responsibility for and agrees to pay, and also agrees to indemnify, and hold the Railroad harmless from and against all loss, damage, cost, liability, judgments or expense (including necessary counsel fees), in connection with any loss, injury or damage *of any and every character and howsoever caused,* whether to employees of either party hereto or to third persons, or to the property of either party hereto, or of other persons, that may be sustained or *incurred in connection* with or arising out of the operation of said power of the Industry over the said sidetrack."

Paragraph 3 of the easement grant dated January 21, 1960, which was incorporated into said agreement, reads as follows:

"3. The party of the second part (railroad) covenants and agrees to hold the party of the first part (industry) harmless from any and all claims and demands of every nature on account of injury to person or persons or injury to or loss of property of the party of the first part or to the property of such other persons, firms or corporations in possession and under the control of the party of the second part hereto, situated on the hereinbefore described property *where caused by the negligence of the party of the second part,* its agents, servants or employees or by any other person or persons, firm or corporation, *provided, however,* that the party of

the first part covenants and agrees to hold party of the second part harmless from any and all claims or demands of every nature on account of injury to persons or damage to or loss of property *which is caused by or results from operation by the industry of its power over the sidetracks located on the easement hereby granted,* or by employees of the party of the first part in the carrying out of the provisions of paragraph 2 hereof."

While it is no particular aid in construing a contract when standards for construction are established by the courts of the state, it is not inappropriate to point out that the construction we give to this contract is not as extreme as it sounds. A contract by Tennessee to indemnify and hold harmless the railroad company for any injury that may arise from the use by Tennessee of railroad equipment, merely means that if such an injury occurs the parties need not undertake to go to battle to determine whose negligent act, if in fact there was negligence at all, produced the injury. It relieves the railroad company, as one of the contracting parties, from the necessity of disproving its negligence. It merely takes that issue out of the area of controversy. In effect, it seems to us, that in light of the relation of the parties here, the railroad company was simply not willing to permit conjunctive use of railroad equipment by an industrial concern which may well be presumed not to have the same skill in operation of railroad equipment as the railroad company itself without requiring of the industry that it assume absolute liability with respect to any injuries resulting therefrom. The fact that earlier provisions of the contract expressly provided that the railroad company would be liable for its own negligence in all cases except when the "power" of the industry was used, gives full meaning to the term "howsoever caused" and causes it to have the specificity that is required by the Florida courts.

We turn next to the contention that the claim based on the indemnity agreement was barred by the Florida three-year statute of limitations relating to actions for personal injury.[1]

It is the contention of the appellant Tennessee Corporation that since the "gist" of the action was the damage or injury caused to its railroad equipment, the Florida cases make the three-year statute applicable whether the suit is filed on the theory of negligence or based on a contractual obligation, citing *Nicholson v. City of St. Petersburg,* 163 So. 2d 775 (2d Fla. App. 1964) and *O'Grady v. Wichman,* 213 So. 2d 321 (4th Fla. App. 1968). It is clear that these decisions stand for the proposition stated in the Wisconsin decision of *Klingbeil v. Saucerman,* 1917, 165 Wisconsin 60, 160 N.W. 1051, because they expressly adopt the principles stated in that case. The principle may be stated as follows: "Where a statute limits the time in which an action for 'injuries to the person' may be brought, the statute is applicable to all actions, the real purpose of which is to recover for an injury to the person, whether based upon contract or tort, in preference to a general statute limiting the time for bringing actions ex contractu."

The difficulty with application of this principle to the case before us is that this is not an action at all for injury to the goods or chattels of the railroad corporation. It is a suit for breach of Tennessee Corporation's agreement to indemnify the railroad in the event of any loss or injury, and the cause of action accrued only after a demand for indemnification had been made and this had been refused. It is not an action based on negligence,

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[1]Section 95.11. Limitations upon actions other than real actions—Actions other than those for recovery of real property can only be commenced as follows:

. . . . .

(5) Within three years

(c) An action for taking, detaining or injuring any goods or chattels . . ."

because, as pointed out above, the parties eliminated the theory of negligence as a basis for recovery. It is a right created only by contract, and as to which no alternative claim for damages upon a theory of negligence is now present in the case. We conclude that the trial court properly overruled the motion to dismiss the indemnification counts as being time barred.

We have carefully considered the remaining objection by the appellant to the inclusion of overhead items and other challenged items in the element of damages. We agree that the trial court properly concluded that true indemnification would contemplate the inclusion of these items as an element of damages for breach of the contract.

The judgment is AFFIRMED.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1969

No. 28007

D. C. Docket No. Civ. 67-276-T

SEABOARD COAST LINE RAILROAD COMPANY,
Plaintiff-Appellee—Cross-Appellant,
versus
TENNESSEE CORPORATION,
Defendant-Appellant—Cross-Appellee.

Appeals from the United States District Court for the Middle District of Florida.

Before BROWN, Chief Judge, TUTTLE and MORGAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that defendant-appellant-cross appellee pay to plaintiff-appellee-cross appellant, the costs on appeal to be taxed by the Clerk of this Court.
Issued as Mandate: January 27, 1970

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28007

SEABOARD COAST LINE RAILROAD COMPANY,

Plaintiff-Appellee, Cross-Appellant,

versus

TENNESSEE CORPORATION,

Defendant-Appellant, Cross-Appellee.

Appeal from the United States District Court for the Middle District of Florida.

(February 19, 1970)

ON PETITION FOR REHEARING

Before BROWN, Chief Judge, TUTTLE and MORGAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SEABOARD COAST LINE RAILROAD COMPANY, a Virginia Corporation,	)	
Plaintiff,	)	
v.	)	Case No. 67-276 Civ.T.
TENNESSEE CORPORATION, a Delaware corporation,	)	
Defendant.	)	

FINAL JUDGMENT

This action came on for trial before the Court and a jury, the Honorable Ben Krentzman, District Judge, presiding, summary final judgment in favor of the plaintiff and against the defendant on the issue of liability on Counts I and III having heretofore been entered, and at the close of all the evidence and before submission of the case to the jury, the Court, on motion of the plaintiff, having directed a verdict for the plaintiff on the issue of damages, finding that the defendant is indebted to the plaintiff for property damage in the amount of $15,511.28, plus interest from April 22, 1964 to March 13, 1969, being four years, ten months, nineteen days, and amounting to $4,547.30, plus costs and expenses of the plaintiff in the defense of the case in Circuit Court, Thirteenth Judicial Circuit, in and for Hillsborough County, Florida, enstyled Herman L. Johns vs. Atlantic Coast Line Railroad Company, Case No. 44141-L, comprising of a reasonable attorney's fee of $2000.00, plus costs of $200.00, plus interest on costs from July 24, 1964 to March 13, 1969, being four years, seven months,

and seventeen days, of $55.57 for a total cost and expense of the defense of said personal injury action of $2,255.57, the defendant being indebted to the plaintiff in the total amount of $22,314.15, and the Court being otherwise advised in the premises, IT IS

ORDERED and ADJUDGED that the plaintiff, SEABOARD COAST LINE RAILROAD COMPANY, recover of and from the defendant, TENNESSEE CORPORATION, the sum of $22,314.15, plus interest thereon hereafter at the rate of 6% per annum as provided by law, plus its costs of this action to be taxed by the Clerk.

DONE and ORDERED in Chambers this 24th day of March, 1969 at Tampa, Florida.

/s/ Ben Krentzman

District Judge

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